

Message

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To: Donaldson, Guy [Donaldson.Guy@epa.gov]; Feldman, Michael [Feldman.Michael@epa.gov]; Young, Carl [young.carl@epa.gov]
Subject: SSM WAR entry

Scheduling Order Issued in Challenge to Region 6's Withdrawal of Texas SSM SIP Call:

On April 13, 2020, the U.S. Circuit Court of Appeals for the District of Columbia (D.C. Circuit) issued a scheduling order in the case challenging Region 6's February 7, 2020 action finding that the affirmative defense provisions in the State Implementation Plan (SIP) for Texas for excess emissions during malfunctions are consistent with Clean Air Act (CAA) requirements. On April 7, 2020, nine environmental groups including the Sierra Club petitioned the D.C. Circuit to review Region 6's February 7, 2020 action withdrawing a SIP Call issued to Texas on June 12, 2015. Sierra Club et al. v. EPA (Case No. 20-1115, D.C. Cir.). As part of EPA's Startup, Shutdown, and Malfunction (SSM) SIP Action in 2015 involving 36 states, EPA had previously taken the position that the affirmative defense provision in the Texas SIP made the SIP substantially inadequate to meet the requirements of the CAA. On March 15, 2017, TCEQ petitioned EPA to reconsider the SIP call issued to Texas in the 2015 SSM SIP Action. On October 16, 2018, Region 6 received concurrence from EPA headquarters to convene a proceeding for reconsideration of the SIP call issued to Texas, the result of which was the final action published on February 7, 2020. Under the Texas SIP, sources may assert a narrowly-tailored affirmative defense to civil penalties during an enforcement action for excess emission violations arising from sudden and unforeseeable events beyond the control of the operator. The Court's April 13, 2020 scheduling order requires the parties to file any procedural motions by May 13, 2020. Region 6 plans to coordinate with EPA Headquarters and DOJ on any filings with the Court.

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